Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

* * *

NO. 77-835

* * *

UNIVERSITY OF TEXAS SYSTEM, ET AL,
Petitioner

v.

DR. SAID A. ASSAF,
Respondent

* * *

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

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IN THE

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* * *

NO. _____

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UNIVERSITY OF TEXAS SYSTEM, ET AL,
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v.

DR. SAID A. ASSAF,
Respondent

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

* * *

Petitioners, the University of Texas System, et al, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on July 26, 1977, with rehearing denied on September 19, 1977.

OPINION BELOW

The opinion of the Court of Appeals, is not reported. The opinion along with the Order overruling Petitioners' Petition for Rehearing and the judgment of the Court are attached as Appendices hereto. Also attached is the decision of the District Court which was appealed to the Court of Appeals.

JURISDICTION

The opinion of the Court of Appeals was entered on July 26, 1976. A timely petition for rehearing with a suggestion that the rehearing be en banc was denied on September 19, 1977. This Court's jurisdiction is envoked under 28 U.S.C. §1254(1)

QUESTION PRESENTED

Whether an Appellate Court can properly dismiss an appeal as moot *without* vacating the judgment of the lower Court when the judgment in question has held that a university regulation, dealing with the termination of faculty in a statewide university system, is unconstitutional--such holding barring the future use of the Rule by the University because of the doctrines of res judicata and collateral estoppel.

UNIVERSITY RULES INVOLVED

The following Rules of the Board of Regents, University of Texas System, are pertinent to this Petition:

6.8 In the event of decision not to reappoint a nontenured faculty member, written notice will be given him or her not later than March 1st of the first academic year of probationary service if the appointment expires at the end of that academic year, or not later than December 15th of the second academic year of probationary service if the appointment expires at the end of that academic year. After two or more academic years written notice shall be given not later than August 31st that the subsequent year will be the terminal academic year of appointment. The notice required by this Section is not applicable where

termination of employment is for good cause under Section 6.3 above.

6.(10) Reappointment of nontenured members of the faculty to a suceeding academic year, reappointment of members of the faculty who are serving a seven-year term appointment to a succeeding seven-year term appointment, or the award of tenure or a seven-year term appointment, may be accomplished only by notice by the chief administrative officer of a component institution or his delegate with the approval of the Board of Regents. Notwithstanding any provision of Sections 6.23, 6.8, or 6.9 to the contrary, no person shall be deemed to have been reappointed or to have been awarded tenure or a seven-year appointment because notice is not given or received by the time prescribed in Sections 6.23, 6.8, or 6.9 or in the manner prescribed in Section 6.(11). Should it occur that no notice is received by the time prescribed in Sections 6.23, 6.8 or 6.9, it is the duty of the academic employee concerned to make inquiry to determine the decision of the chief administrative officer of a component institution, who shall without delay give the required notice to the academic employee.

STATEMENT OF THE CASE

Dr. Said A. Assaf, Respondent herein and the Plaintiff in the District Court below, filed suit on July 25, 1975, in the United States District Court for the Southern District of Texas against the University of Texas System, its Board of Regents, the University of Texas Medical School and certain administrators of the medical school.

Assaf alleged that, under the notice rules of the System, he had been improperly terminated as of August 31, 1975, and asked that the district court enjoin his termination. Assaf also alleged that he had been denied a liberty interest because his professional competence had been damaged by the dismissal.

A hearing on preliminary injunction was held on August 25, 1975, following which the district court announced from the bench an order enjoining the termination of Dr. Assaf on August 31, 1975, requiring the institution to hold a hearing on his termination within two weeks, and enjoining enforcement of Section 6.(10) of the rules of the Board of Regents. On September 4, 1975, the district court entered a memorandum opinion finding as fact that Dr. Assaf was an untenured faculty member serving under his second one-year appointment, that the contract of appointment then in effect provided an end to his employment on August 31, 1975, and was in its terms subject to the rules of the Board of Regents, and that Dr. Assaf first received notice of his termination from further employment on March 22, 1975. The Court found that the March notice was untimely since Section 6.8 of the Regents' rules required written notice of termination to be given by December 15 of the second academic year and that Assaf was serving in his second academic year. (These facts, along with the text of the pertinent rules, were essentially undisputed.)

As a basis for the preliminary injunction entered, the district court held that the rules of the Board of Regents, taken as a whole, required that Dr. Assaf be given written notice of non-reappointment by December 15, 1974, and, in the disputed absence of such notice, entitled him to be continued in his employment until afforded a hearing concerning his termination. This conclusion was reached notwithstanding Section 6.(10)

of the rules, which provides that *reappointment* of nontenured faculty members may be accomplished only by notice from the chief administrative officer of the institution with the approval of the Board of Regents and that no person shall be deemed reappointed because no notice of termination is given or received, and which requires a faculty member in such circumstances to request a decision from the chief administrative officer, whereupon notice of such decision is to be given without delay. To the extent this provision nullified the other notice requirements of the rules, the district court held it unconstitutional as violative of due process.

Rather than comply with the district court's requirement that a hearing be given Assaf in connection with his discharge, the University gave Assaf notice on August 30, 1975, that he was to be terminated on August 31, 1976 (the district court's original decision was announced from the bench on August 25, 1975) and later appealed the decision of the district court when the written opinion and judgment were entered.

The second notice of termination to Assaf, given on August 30, 1975, became the subject of a second lawsuit in the United States District Court. This second notice was upheld as proper by the district court and the Court of Appeals, and Assaf left the payroll of the University on August 31, 1976.

Accordingly when the subject case was argued on June 16, 1977, the question of Assaf's dismissal as of August 31, 1975 (the first abortive dismissal), was indeed moot as the Court of Appeals later decided.

However, the constitutionality of Section 6.(10) of the Regents' Rules, which the University raised in its appeal remained and remains undecided.

The University, in its argument to the Court of

Appeals, requested that the Court vacate the judgment of the district court in its order dismissing the appeal for mootness. Subsequent to the argument on June 16, 1977, the University filed its Motion to Order Vacation of Judgment Upon Dismissal for Mootness with the Court of Appeals. (A copy of such Motion is reporduced in the Appendix to this Petition.) This motion did not request that the Court of Appeals order that the Complaint in the district court be dismissed as would have been customary since Assaf has pending a liberty interest claim. This motion was denied on July 25, 1977 (a copy of the denial appears in the Appendix to this Petition), and as earlier indicated, the Court of Appeals entered its opinion in this case on July 26, 1977, as follows:

> "The Appeal is dismissed for mootness."

The University then filed a petition for rehearing (with the suggestion that the rehearing be heard en banc) in the Court of Appeals; the petition was overruled on September 19, 1977.

The University, the Petitioner here, now files this Petition for Writ of Certiorari.

REASON FOR GRANTING THE WRIT

The action for the Court of Appeals in dismissing the appeal but refusing to vacate the judgment of the district court leaves alive and viable a judgment holding a rule of the Board of Regents to be unconstitutional, a decision which the University cannot challenge by appellate review. This Court of Appeals ruling is in conflict with the decisions of this Court and with all judicial reasoning and fiats governing the dismissal of appellate cases for mootness.

Rules Governing Dismissal For Mootness

The general rule governing dismissal for mootness by an appellate court is to accompany such order of dismissal with an order vacating the judgment below and to remand with directions to dismiss the case. *United States v. Munsingwear*, 340 U.S. 36, 71 S.Ct. 104, 95 L.Ed. 36 (1950); *Diffenderfer v. Central Baptist Church*, 404 U.S. 412 (1972); *Board of Regents of the University of Texas v. New Left Education Project*, 414 U.S. 807 (1974); reversing *New Left Education Project v. Board of Regents*, 472 F.2d 218 (5th Cir. 1973); *Duke Power Company v. Greenwood County;* 229 U.S. 259 (1936); *Troy State University v. Dickey*, 402 F.2d 515 (5th Cir. 1968); *Libus v. Seafarer's International Union*, 398 F.2d 281 (5th Cir. 1968).

The application of the general rule, vacation of the judgment upon dismissal of an appeal for mootnes, is not dependent upon the reason that the case has become moot. The rule applies whether a case becomes moot through happenstance or because of the actions of one of the parties. *Board of Regents v. New Left Education Project, supra; Diffenderfer v. Central Baptist Church, supra; Hall v. Beals*, 396 U.S. 45 (1969).

The logic and philosophy behind the rule requiring the vacation of the judgment of the lower court is to prevent legal consequences, either by precedential effect or res judicata, from arising from a judgment which was rendered unreviewable because of mootness. *United States v. Munsingwear, supra; Troy State University v. Dickey, supra; Libus v. Seafarer's International Union, supra.*

The danger to Petitioners is very real in this case. The District Court below held unconstitutional a rule of the Board of Regents of the University of Texas System

which applies to all institutions in the System in situations where faculty termination is contemplated or decided. Whether or not this rule is unconstitutional (and Petitioners brought their appeal below urging the constitutionality of the rule), the University is now bound by res judicata and collateral estoppel by the decision of the District Court and can nevermore enforce and apply the rule to any of its personnel—until and unless the judgment below is vacated. The Petitioners, as parties to the judgment below, are controlled by that judgment and, in the future, should any dismissed professor assert that the dismissal was ineffective because it was predicated upon the Rule in question, the University would find difficulty in countering that argument because they are collaterally estopped by the District Court judgment. *Blonder-Tongue Laboratories v. University of Illinois Foundation*, 402 U.S. 313 (1971); *Porter Exchange, Inc. v. National Screen Service Corporation*, 517 F.2d 117 (5th Cir. 1975); *Monsanto Company v. Dawson Chemical Company*, 443 F.2d 1035 (5th Cir. 1971), cert. denied 405 U.S. 974; *Seguros Tepeyac, S.A. v. Jernigan*, 410 F.2d 718 (5th Cir. 1969).

While, in a later case, the University might be able to show that it "did not enjoy 'a fair opportunity procedurally, substantively and evidentially to pursue . . . (its) claim the first time' ", i.e., no viable appellate review, this requisite inquiry could be avoided by the vacation of the judgment below (quoted language is from *Porter Exchange, Inc. v. National Screen Service Corporation*, 517 F.2d at 123).

Moreover, even if the University could sustain the necessary showing of unfairness in each future case to avoid the effects of collateral estoppel, the precedential effect of the decision of the District Court would still weigh against the University. *Troy State University v. Dickey, supra.*

Petitioners submit that dismissal for mootness and vacation of the District Court judgment below, do not require that the case below be dismissed in its entirety. The Court of Appeals could have properly preserved Plaintiff-Respondent's unresolved and unmooted claims and at the same time protected. Petitioners from the effects of an unreasonable District Court decision—by vacating the judgment below (when ordering dismissal of the appeal for mootness) but without ordering the dismissal of the entire case below. Tailoring a dismissal for mootness to the needs of the parties has been judicially countenanced and possibly judicially required. *Diffenderfer v. Central Baptist Church, supra; Duke Power Company v. Greenwood County, supra.*

When the Court of Appeals for the Fifth Circuit dismissed the appeal for mootness in *New Left Education Project v. Board of Regents, supra*, but refused to vacate the judgment of the lower court holding a Rule of the Board of Regents unconstitutional, this Court granted certiorari and entered a summary order vacating the judgment of the district court and remanding with directions to dismiss for mootness. *Board of Regents v. New Left Education Project, supra.* The situation in this case is procedurally similar to the *New Left Education Project* case, and Petitioners ask this Court to vacate the district court judgment or to require the Court of Appeals to order the vacation of the district court's judgment.

CONCLUSION

The Petition for Writ of Certiorari should be granted and this Court should vacate the judgment of the district court or order the Court of Appeals below to vacate such judgment.

Respectfully submitted,

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DAVID M. KENDALL
First Assistant Attorney General

STEVE BICKERSTAFF
Assistant Attorney General

LONNY F. ZWIENER
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Attorneys for Petitioners

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(512) 475-3131

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Writ of Certiorari has been served upon Respondents by depositing same in the United States Mail, certified, return receipt requested, addressed to attorney for Respondent, Mr. Larry Watts, 5620 Greenbriar, Suite 103, Houston, Texas, 77005, on this ____ day of _____, 1977.

LONNY F. ZWIENER

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 75-3493

DR. SAID A. ASSAF,
Plaintiff-Appellee,

versus

UNIVERSITY OF TEXAS SYSTEM, ET AL,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Texas

(July 26, 1977)

BEFORE GOLDBERG, FAY, Circuit Judges, and DUMBAULD, District Judge

PER CURIAM:

The appeal is dismissed for mootness.

* District Judge **of** the Western District of Pennsylvania sitting by designation.

APPENDIX B

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

Edward W. Wadsworth
Clerk

Tel 504-589-6514
600 Camp Street
New Orleans, La. 70130

OFFICE OF THE CLERK

September 19, 1977

TO ALL PARTIES LISTED BELOW:

NO. 75-3493 - DR. SAID A. ASSAF v. UNIVERSITY SYSTEM, ET AL.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing*, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

Edward W. Wadsworth,
Clerk

By _____
Deputy Clerk

*on behalf of appellants, University of Texas System, et al.,

cc: Messrs. John L. Hill
David M. Kendall
J. C. Davis
Lonny F. Zwiener
Mr. Michael D. Cordell
Mr. Larry Watts
Messrs. Matthew W. Finkin
Woodley B. Osborne
Messrs. Michael H. Gottesman
Robert M. Weinberg
Ms. Julia Penny Clark

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. **75-3493**

D. C. Docket No **CA75-H-1266**

DR. SAID A. ASSAF,

Plaintiff-Appellee,

versus

UNIVERSITY OF TEXAS SYSTEM, ET AL.,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Texas

Before GOLDBERG and FAY, Circuit Judges, and DUMBAULD*, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the appeal in the above styled and numbered cause be, and the same is hereby, dismissed;

It is further ordered that defendants-appellants pay

to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

July 26, 1977

Issued as Mandate: SEP 27 1977

---

*District Judge of the Western District of Pennsylvania, sitting by designation.

A true copy
Test: Edward W. Wadsworth
Clerk, U.S. Court of Appeals,

Fifth Circuit

By _____
Deputy

New Orleans, Louisiana

OCT 26 1977

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
DIVISION

Clerk, U.S. District Court
Southern District of Texas
FILED
SEP 4 1975
V. Bailey, Thomas, Clerk
By Deputy: *Judy Boslen*

DR. SAID A. ASSAF

V. CIVIL ACTION NO. 75-H-1266

UNIVERSITY OF TEXAS SYSTEM, ET AL.

Memorandum Opinion

Plaintiff contends that he is being deprived of certain basic civil rights guaranteed him by the Constitution in a context that would confer jurisdiction on this court where one seeks to vindicate such rights. Therefore, this action is premised upon jurisdiction in this court under the provisions of 28 U.S.C. § 1343, 42 U.S.C. § 1983, and 28 U.S.C. § 1331. Having considered plaintiff's complaint and defendants' motion to dismiss, this court concludes that jurisdiction is in fact proper under the above-named sections and is sufficient to grant this court power to confer the limited relief sought.[1] Therefore, on motion of plaintiff for a preliminary injunction and declaratory relief, a hearing was held in this cause on August 25, 1975, and was concluded on that same date.

For the limited purposes of the hearing convened by this court, the facts as this court finds them are quite simple. Dr. Assaf, plaintiff, is a nontenured faculty member in his second year at The University of Texas Health Science Center at Houston, Texas. Dr. Assaf was reappointed to his position with The University of Texas System pursuant to a contract dated August 9, 1974. Under this contract, his employment would end on August 31, 1975. The contract of employment specifically stipulated that Dr. Assaf's appointment was subject to the provisions of the *Rules and Regulations* of the Board of Regents of the University of Texas System.

The *Rules and Regulations* of the Board of Regents of The University of Texas, specifically in Sections 6.8 and 6.(10), set out procedures by which notice of reappointment or nonreappointment of nontenured faculty members shall be given (see Appendix). The written notice required by Section 6.8, in the event of a decision not to reappoint a nontenured faculty member, is specifically referred to in Sections 6.23, 6.35, 6.(10), and 6.(11) of the *Rules and Regulations.*

> In relevant part, Section 6.23 reads as follows:
>
> . . . In the event that the employment of a nontenured faculty member is to be terminated prior to the end of the maximum probationary period [seven years], notice shall be given in accordance with Section 6.8 below.
>
> In relevant part, Section 6.35 reads as follows:
>
> Nontenured faculty members who are notified in accordance with Section 6.8 that they will not be reappointed or who are notified in accordance with Section 6.23, 6.8, or 6.9 that

the subsequent academic year will be the terminal year of appointment . . . .

Section 6.(11) reads as follows:

> Each faculty member shall keep the chief administrative officer of the component institution or his delegate notified of his current mailing address. The written notice required by Sections 6.23, 6.8, or 6.9 shall be sent by certified mail, return receipt requested, to the last address given by the faculty member.

Further, Sections 6.23, 6.35, 6.8, and 6.(11) in no way direct one to Section 6.(10) nor in any way imply or expressly state that such sections are subject to or controlled by Section 6.(10).

Dr. Assaf first received written notice on March 22, 1975, that his appointment would be terminated no later than September 1, 1975. This notice of termination was given to Dr. Assaf by Dr. Joel L. Moake, Director of the Division of Hematology, who was Dr. Assaf's superior. Dr. Assaf contests the validity of his termination.

With regard to conclusions of law, at the threshold this court must address the question of whether the issues presented before it are matters that require determination by a three-judge court. The court concludes that they are not, relying upon the case of *Board of Regents of The University of Texas System v. New Left Education Project*, 401 U.S. 541 (1972). In the above-cited case, the Supreme Court came to the conclusion that the very Regents' *Rule and Regulations* in issue here were not rules of statewide application. Therefore, such characterization as rules of merely local application precludes the necessity for a three-judge court to review an attack on their constitutionality.

The second question which this court faces is the scope of the relevant inquiry. The court feels constrained to confine itself to the boundaries set out in *Ferguson v. Thomas*, 430 F.2d 852 (5th Cir. 1970), with due regard to the guidelines set out in *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Perry v. Sindermann*, 408 U.S. 593 (1972).

The mandate of Ferguson set out on page 858 of that opinion is as follows:

> School constituted review bodies are the proper forums for thrashing out such matters. Federal Court hearings in cases of this type should be limited in the first instance to the question of whether or not federal rights have been violated in the procedures followed by the academic agency in processing the plaintiff's grievance. If a procedural deficit appears, the matter should, at that point, be remanded to the institution for its compliance with minimum federal or supplementary academically created standards. This should be done so that the matter can first be made ripe for court adjudication by the school authorities themselves.

The *Ferguson* court clearly articulates its concern for federal judicial efficiency as well as due regard for the relevant competing interests by requiring that a federal district court's inquiry be limited to a determination that the institutional procedures by which a person is terminated comply with due process. *Ferguson, supra* at 859.

However, in order to reach the inquiry set out in *Ferguson*, a preliminary question must be viewed. That question is whether the due process clause of the

fourteenth amendment requires that in this instance there be a hearing at all. This court must take as a basic premise that without more, an untenured faculty member has no inherent right to a hearing just because his employment is terminated. In order for the protection afforded by the due process clause of the fourteenth amendment to be triggered, there must be a deprivation of some interest that is sought to be protected. That is, there must be some property right or liberty right endangered for procedural due process to elevate the right to a hearing to a level of paramount importance. *Board of Regents v. Roth*, 408 U.S. 564 (1972). Therefore, plaintiff must establish that he has some cognizable property or liberty interest which would require a hearing.

In this case, the employment contract of Dr. Assaf stipulates that the contract is subject to the *Rules and Regulations* promulgated by the Board of Regents of The University of Texas System. This court finds that both parties are bound by that agreement and therefore are bound by the terms of the *Rules and Regulations*.

Section 6.8 of the *Rules* expressly provides that an untenured faculty member in Dr. Assaf's situation, *i.e.* in his second year, will receive written notice of a decision not to reappoint him not later than December 15, in this case of 1974. After a careful reading of the entire Section 6, this court can only conclude that this required notice was an unequivocal right. As a matter of law, therefore, the notice of termination given on March 22, 1975, was in direct violation of the Regents' *Rules and Regulations* which in large part are determinative of the rights and expectations of the parties to the employment contract herein.

As stated above, this court has found that Sections 6.23, 6.35, 6.(10), and 6.(11) of the *Rules and Regulations*

all refer to Section 6.8. Section 6.23 declares in mandatory terms that "notice shall be given in accordance with 6.8" to a nontenured faculty member in the context presented in this case. Section 6.35 also refers to notification by Section 6.8. Section 6.(11) speaks in terms of "[t]he written notice required by Section 6.23, 6.8 . . . ." The clear import of all of these sections is to place a self-imposed affirmative duty of notification on the university administration. As the court states above, Sections 6.23, 6.35, 6.8, and 6.(11) in no way direct one to Section 6.(10) nor in any way imply or expressly state that such sections are subject to or controlled by Section 6.(10).

Section 6.(10) on the other hand appears to attempt to negate the clear intention of the *Rules and Regulations*, which is that notice of nonreappointment be given a nontenured faculty member. But statutory construction requires that statutes or rules be viewed in their entirety. This method of analysis arises from the general presumption that the whole of a statute is intended to be effective. Thus, this court feels compelled to try to reconcile Section 6.(10) with the spirit of giving notice which the rest of Section 6 clearly reflects.

Section 6.(10) must therefore be viewed as a purely remedial section. That is, it contemplates that the University need not reappoint a faculty member to his former position. The administration may rather leave a person with an otherwise valid contract to his contractual remedies only. This view is consistent with the flexibility which an educational institution must have in its hiring and firing practices. However, it tacitly acquiesces in the reality that other conduct of the University may have given rise to a justified and legally protected contract expectation in a faculty member.

If not a remedial section, then Section 6.(10) is really purely a trap for the unwary. It would seek to shift a burden already affirmatively undertaken. In this posture,the question squarely presented is whether in the present context a state institution can by some legerdemain divest an individual of a procedural right which that institution has ostensibly already vested upon him. This court concludes that the conduct of the University of Texas insofar as it takes with one hand that which it has just bestowed with the other hand is not the kind of fair play and substantial justice required by due process under the fourteenth amendment.[2] Therefore, insofar as Section 6.(10) would nullify the notice requirements of Section 6.8 and to the extent that it thereby shifts the burden of inquiry to the academic employee, Section 6.(10) is declared unconstitutional. Specifically, the unconstitutional portion of Section 6.(10) of the *Rules and Regulations* of the Board of Regents of The University of Texas would be as follows:

> . . . Notwithstanding any provision of Sections 6.23, 6.8, or 6.9 to the contrary, no person shall be deemed to have been reappointed or to have been awarded tenure or a seven-year appointment because notice is not given or received by the time prescribed in Sections 6.23, 6.8, or 6.9 or in the manner prescribed in Section 6.(11). Should it occur that no notice is received by the time prescribed in Sections 6.23, 6.8 or 6.9, it is the duty of the academic employee concerned to make inquiry to determine the decision of the chief administrative officer of a component institution, who shall without delay give the required notice to the academic employee.

This court at the outset has concluded that *Board of Regents v. Roth, supra,* and *Perry v. Sindermann,* 408

U.S. 593 (1972), compel that some property or liberty right be found in order for plaintiff to be afforded the protection of the fourteenth amendment. In this case, even absent a constitutional infirmity in Section 6.(10), the court's statutory construction analysis would predicate a conclusion that plaintiff must be afforded a hearing.

In simple summary the court reasons as follows:

1. The relevant *Rules and Regulations* provide that a nontenured faculty member will be notified by December 15, if he is not to be reappointed.

2. The University of Texas System through Dr. Assaf's superiors failed to comply with their own rule of notification.

3. The failure of notification gave rise to a justified expectation interest in Dr. Assaf that he would be rehired. Dr. Assaf's right to a contract for at least one more year is in the nature of a property right.

4. The property right which Dr. Assaf has is sufficient to require that he be given a hearing in compliance with due process as articulated in *Roth* and *Sindermann.*

The nature of the property right vested in Dr. Assaf requires expansion. The admonition in *Perry v. Sindermann, supra* at 603, is that a mere "subjective expectancy" is not sufficient for procedural due process protection. When this court speaks of an expectancy of reemployment, it speaks in much the same terms as the court in *Ferguson v. Thomas, supra.* When that court spoke of "expectancy" it is clear that it was speaking in terms of a legal right analogous to the property right of which *Roth* and *Sindermann* spoke.[3] The *Ferguson* court's reasoning is clarified by its citation of *Green v.*

Howard University, 412 F.2d 1128 (D.C. Cir. 1969), for the following proposition:

> But a college can create an obligation as between itself and an instructor where none might otherwise exist under the legal standards for the interpretation of contract relationships regularly applied to transactions in the marketplace if it adopts regulations or standards of practice governing nontenured employees which create an expectation of reemployment.

430 F.2d 852, 856 (1970). Further, in the present case, the fact that a legal property right in a future contract exists is even more apparent since the contractual rights of the parties are specifically made subject to The University of Texas System's *Rules and Regulations*.

As to the relief to be granted by this court, due process requires that plaintiff be given an expeditious hearing.

Further, this court feels compelled to issue an order temporarily staying the termination of Dr. Assaf, pending the outcome of a hearing as ordered by this court. This court in deciding to grant what in substance amounts to a preliminary injunction is guided by the test set forth in *Blackshear Residents Organizations v. Romney*, 472 F.2d 1197 (5th Cir. 1973).

First, from this court's exposition on the justified expectations of plaintiff with regard to future employment and from the perforce limited testimony on the record, this court must conclude that plaintiff is likely to prevail on the merits.

A second question, whether plaintiff is in danger of suffering irreparable harm, is a more difficult one. The case of *Sampson v. Murray*, 415 U.S. 61 (1974), has been

put forth by defendants as being conclusive on the issue in their favor. In fact, there are many analogies to be drawn. However, this court would distinguish the context of *Sampson* from the present one. In *Sampson*, it was the action of a federal agency which was ultimately to be enjoined. Here, the relevant actions to be stayed are in essence acts by state officers. It can be argued that where federal and state relationships are implicated, the spirit of accommodation would strongly suggest an injunction to be inappropriate. However, this court believes that even in the face of federalist implications, this is the "genuinely extraordinary situation" which the Sampson court believes appropriate for the exercise of a federal court's equity powers. *Supra*, footnote 5 at 188. Here, there is much more than a temporary loss of income which the *Sampson* court admonishes to be insufficient to alone constitute irreparable injury. *Supra* at 186-187. Not only will plaintiff suffer loss of income but also academic prestige and research resources which are a sheer necessity to an academician, especially one in the sciences. Clearly, money damages would be wholly inadequate to compensate plaintiff for his loss of standing in the academic community. Further, even a temporary deprivation of the cloak of professorial status which allows plaintiff to mingle as an equal in the academic milieu, can only be poorly replaced by money. Also, here plaintiff faces termination less than a week from the date of this court's hearing. It is clear that this situation has come about purely from the inability of plaintiff to clearly ascertain his status until a short time ago. If any fault is to be found, it is in the bureaucratic monolith which operates in most state institutions. Under all the circumstances, in this court's view the anticipated harm must be characterized as irreparable. Therefore, at least until there has been a fair determination, in a proper hearing, of the validity of plaintiff's termination, this court is

persuaded that fundamental fairness requires that plaintiff's employment not be terminated.

With regard to the third question posed by the *Blackshear* test, and considering the relative positions of plaintiff and defendants, this court feels that whatever burden is placed upon defendants in their exercise of administrative control is minimal and greatly outweighed by the harm to plaintiff which this court seeks to prevent. Also, this court would not challenge the right of a proper University hearing body to ultimately and fairly determine that termination was in fact proper in this case.

As a final point, *Blackshear* would require this court to inquire into whether the issuance of a preliminary injunction in this instance would serve the public interest. This court would respond in the affirmative. Of course, there is a highly important public interest in education and the educational process. The public has a right to expect that faculty members who will directly or indirectly affect the education of their children shall be of impeccable character and have the highest credentials. An accompanying interest of at least equal importance is an interest that there be a fair determination that the educational system is not being deprived of the expertise of people of superior caliber for merely frivolous reasons not relevant to academic excellence. Until such a determination of the validity of termination has been made, then a presumption of competence and integrity which is an integral part of public confidence in public education mandates that a professor be retained. In a broader sense, this court is saying that the public interest in the present context is best served by not terminating an individual until the due process prescribed has been complied with.

A final issue that must be addressed is whether the

peripheral financial consequences precipitated by a stay of termination of employment in this case ought to deter this court from staying termination. The problem is that a stay of termination of employment must of necessity require that the professor be paid out of state funds for a period beyond his asserted valid time of employment. This court must reject any analysis which would place the eleventh amendment as a bar to the court's actions. In general, this court feels that the stay issued by this court falls well within the parameters set out in *Ex Parte Young*, 209 U.S. 123 (1908). Further, this court relies on *Edelman v.Jordan*, 415 U.S. 651, 673-674 (1974), and the Supreme Court's articulation therein of the distinctions between the granting of prospective or retroactive relief. Prospective injunctive relief is generally permissible. Here, this court ordered that a termination which had clearly not yet occurred be held in abeyance. Further, whatever the monetary implications of the court's order might be, they are purely incidental to the primary purposes of the relief granted. *Edelman v. Jordan*, 415 U.S. 651, 675 (1974). Therefore, this court concludes that it has afforded plaintiff only that relief which justice and the circumstances require.

DONE at Houston, Texas, on this 4th day of September, 1975.

United States District Judge

FOOTNOTES

[1]In finding jurisdiction, this court rejects any construction that would permit plaintiff to seek relief under U:S.C. § 1983 against parties not construed to be "persons" under that statute, nor to obtain any relief prohibited by the eleventh amendment. *City of Kenosha v. Bruno*, 412 U.S. 507 (1973) and *Ex Parte Young*, 209 U.S. 123 (1908). This court does not pass at this time on the jurisdictional questions raised by any other claims which plaintiff has asserted.

[2]This court has chosen to inquire into the question of due process at two distinctly different levels. The inquiry into the constitutionality of Section 6.(10) is of course only one alternative method of establishing that timely written notice is an integral part of Section 6 of the *Rules and Regulations*. At another level of inquiry, due process in the form of a hearing is of course only required if there has been a deprivation of a liberty right or more pertinently here, a property right.

[3]*But see Duke v. North Texas State University*, 469 F.2d 829 (5th Cir. 1973). Judge Godbold, in his dissent (in footnote 5 at 844), obliquely asserts that *Ferguson* 430 F.2d 852 (5th Cir. 1970), has in fact been modified by the *Perry v. Sindermann*, 408 U.S. 593 (1972), "property interest" test. The majority in *Duke* takes note of the dissent's point without expressly agreeing and therefore leaves open the exact degree to which *Ferguson* has been modified. To the extent that *Ferguson* would require somewhat less that a property interest to trigger due process protection, *i.e.* a mere "subjective expectation," this court must of course be controlled by *Roth* and *Sindermann*. However, as articulated in the text, this court feels that *Ferguson* and Sindermann are in fact consistent. And in any event, the guidelines as to the scope of this court's inquiry must still be as prescribed by *Ferguson*, *supra* at 858 and 859.

APPENDIX

6.8 In the event of decision not to reappoint a nontenured faculty member, written notice will be given him or her not later than March 1st of the first academic year of probationary service if the appointment expires at the end of that academic year, or not later than December 15th of the second academic year of probationary service if the appointment expires at the end of that academic year. After two or more academic years written notice shall be given not later than August 31st that the subsequent year will be the terminal academic year of appointment. The notice required by this Section is not applicable where termination of employment is for good cause under Section 6.3 above.

6.(10) Reappointment of nontenured members of the faculty to a succeeding academic year, reappointment of members of the faculty who are serving a seven-year term appointment to a succeeding seven-year term appointment, or the award of tenure or a seven-year term appointment, may be accomplished only by notice by the chief administrative officer of a component institution or his delegate with the approval of the Board of Regents. Notwithstanding any provision of Sections 6.23, 6.8, or 6.9 to the contrary, no person shall be deemed to have been reappointed or to have been awarded tenure or a seven-year appointment because notice is not given or received by the time prescribed in Sections 6.23, 6.8, or 6.9 or in the manner prescribed in Section 6.(11). Should it occur that no notice is received by the time prescribed in Sections 6.23, 6.8 or 6.9, it is the duty of the academic employee concerned to

make inquiry to determine the decision of the chief administrative officer of a component institution, who shall without delay give the required notice to the academic employee.

APPENDIX E

NO. 75-3493

* * *

IN THE

UNITED STATES COURT OF APPEALS

FOR THE

FIFTH CIRCUIT

* * *

DR. SAID A. ASSAF,
Plaintiff-Appellee

V.

UNIVERSITY OF TEXAS SYSTEM, ET AL,
Defendants-Appellants

* * *

Appeal From The United States District Court
For the Southern District of Texas
Houston Division

* * *

MOTION TO ORDER VACATION OF JUDGMENT UPON DISMISSAL FOR MOOTNESS

* * *

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NO. 75-3493

* * *

IN THE

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FOR THE

FIFTH CIRCUIT

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DR. SAID A. ASSAF,
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* * *

MOTION TO ORDER VACATION OF JUDGMENT UPON DISMISSAL FOR MOOTNESS

* * *

TO THE HONORABLE COURT:

Now come Appelants and move the Court to Order Vacation of Judgment Upon Dismissal for Mootness, and, as grounds for such motion, would respectfully show the Court the following:

I

REASON FOR MOTION

This Motion is made because of the holding by the Supreme Court of the United State in *United States v. Munsingwear*, 340 U.S. 36 (1950), wherein the Court held that a motion was a procedural necessity in such a case as this, where res judicata may give permanent effect to a District Court decision and if such judgment is not vacated when an appeal is dismissed as moot.

II

AGREEMENT AS TO MOOTNESS - NON-AGREEMENT AS TO VACATION OF THE DISTRICT COURT JUDGMENT

At oral argument of this cause on June 16, 1977, the parties agreed with this Court that the cause on appeal was moot but no agreement was evident when Appellants requested that any Order of Dismissal for Mootness include a recital that the judgment below be vacated in order to avoid any precedential effect of such judgment. Appellants failed to assert at the argument the serious consequences of the res judicata or collateral estoppel effect of a non-vacated District Court Order. Appellants make such an assertion now.

III

RULES GOVERNING DISMISSAL FOR MOOTNESS

The general rule governing dismissal for mootness by an appellate court is to accompany such order of dismissal with an order vacating the judgment below and to remand with directions to dismiss. *United States v. Munsingwear, supra; Diffenderfer v. Central Baptist Church*, 404 U.S. 412 (1972); *Board of Regents of the University of Texas v. New Left Education Project*, 414

U. S. 807 (1974); reversing *New Left Education Project v. Board of Regents*, 472 F.2d 218 (5th Cir. 1973); *Duke Power Company v. Greenwood County*, 299 U.S. 259 (1936); *Troy State University v. Dickey* 402 F.2d 515 (5th Cir. 1968); *Libus v. Seafarer's International Union*, 398 F.2d 281 (5th Cir. 1968).

The application of the general rule, vacation of the judgment upon dismissal of an appeal for mootness, is not dependent upon the reason that the case has become moot. The rule applies whether a case becomes moot through happenstance or because of the actions of one of the parties. *Board of Regents v. New Left Education Project, supra; Diffenderfer v. Central Baptist Church, supra; Hall v. Beals*, 396 U.S. 45 (1969).

The reason behind the rule requiring the vacation of the judgment of the lower court is to prevent legal consequences, either by precedential effect or res judicata, from arising from a judgment which was rendered unreviewable because of mootness. *United States v. Munsingwear, supra; Troy State University v. Dickey, supra; Libus v. Seafarer's International Union, supra.*

The danger to Appellants is very real in this case. The District Court below held unconstitutional a rule of the Board of Regents of the University of Texas System which applies to all institutions in the System in situations where faculty termination is contemplated or decided. Whether or not this rule is unconstitutional (and Appellant sought this appeal urging its Constitutionality), the University is now bound by res judicata and collateral estoppel by the decision of the District Court and can nevermore enforce and apply the rule to any of its personnel - until and unless the judgment below is vacated. The Appellants, as parties to the judgment below, are controlled by that judgment

and, in the future, should any dismissed professor assert that the dismissal was ineffective because it was predicated upon the Rule in question, the University would find difficulty in countering that argument because they are collaterally estopped by the District Court judgment. *Blonder-Tongue Laboratories v. University of Illinois Foundation*, 402, U.S. 313 (1971); *Porter Exchange, Inc. v. National Screen Service Corporation*, 517 F.2d 117 (5th Cir. 1975); *Monsanto Company v. Dawson Chemical Company*, 444 F.2d 1035 (5th Cir. 19); *Seguros Tepeyac, S.A. v. Jernigan*, 410 F.2d 718 (5th Cir. 1969).

While, in a later case, the University might be able to show that it "did not enjoy 'a fair opportunity procedurally, substantively and evidentially to pursue . . . (its) claim the first time' ", i.e., no viable appellate review, this requisite inquiry could be avoided by the vacation of the judgment below (quoted language is from *Porter Exchange, Inc. v. National Screen Service Corporation*, 517 F.2d at 123).

Moreover, even if the University could sustain the necessary showing of unfairness in each future case to avoid the effects of collateral estoppel, the precedential effect of the decision of the District Court would still weigh against the University. *Troy State University v. Dickey, supra.*

Appellants submit that dismissal for mootness and vacation of the judgment below, do not require that the case below be dismissed in its entirety. The court may properly preserve Plaintiff-Appellee's unresolved and unmooted claims while protecting Appellants from the effects of an undisturbed district decision by vacating the judgment below when ordering dismissal of the appeal from that judgment without ordering the dismissal of the entire case below. Tailoring a dismissal

for mootness to the needs of the parties has been judicially countenanced and possibly judicially required. *Diffenderfer v. Central Baptist Church, supra; Duke Power Company v. Greenwood County, supra.* When this court dismissed the appeal for mootness in *New Left Education Project v. Board of Regents, supra,* but refused to vacate the judgment of the lower court holding a Rule of the Board of Regents unconstitutional, the Supreme Court granted certiorari and entered a summary order vacating the judgment of the District Court and remanding with directions to dismiss for mootness. *Board of Regents v. New Left Education Project, supra.* The situation now before this Court is procedurally similar to the *New Left Education Project* case.

IV

PRAYER

In view of the foregoing, Appellants pray that this Court order that the judgment below be vacated and that this appeal be dismissed as moot.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, LONNY F. ZWIENER, Assistant Attorney General of Texas, attorney for Defendants-Appellants, hereby certify that I have served the above and foregoing Motion to Order Vacation of Judgment Upon Dismissal for Mootness upon Appellee by depositing a copy of the same in the United States Mail, certified mail, return receipt requested, addressed to Mr. Larry Watts, Attorney at Law, 5620 Greenbriar, Suite 103, Houston, Texas 77005, attorney for Appellee, on this the ____ day of June, 1977.

LONNY F. ZWIENER
Assistant Attorney General

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-3493

DR. SAID A. ASSAF
Plaintiff-Appellee,

versus

UNIVERSITY OF TEXAS SYSTEM, ET AL.,
Defendants-Appellants.

- - - - -

Appeal from the United States District Court for the Southern District of Texas

- - - - -

Before GOLDBERG and FAY, Circuit Judges, and DUMBAULD*, District Judge.

BY THE COURT:

IT IS ORDERED that appellants' motion to vacate the lower court's judgment **is DENIED.**

*District Judge of the
Western District of Pennsylvania
sitting by designation.